

SCAARLA BRIEFS

SOUTH CAROLINA ADMINISTRATIVE AND REGULATORY LAW ASSOCIATION

South Carolina Administrative and Regulatory Law Association

Winter 2010

Volume 1, Issue 2

From the Editor

This issue of the Newsletter presents information on a forthcoming free ethics seminar for SCAARLA members, an article on administrative law by South Carolina Department of Health and Environmental Control's General Counsel, Carl Roberts, and an article on International Moot Court judging by John Hodge. Hope you have a happy 2010.

John Hodge Serves As International Moot Court Law Judge

This past spring, SCAARLA member John Adams Hodge, of Haynsworth Sinkler Boyd, P.A., traveled to Washington DC to serve as a judge in the finals of the Phillip C. Jessup International Moot Court Competition. The Jessup competition is held in conjunction with the International Law Students Association and is in its 51st year. It is the world's largest moot court competition with participants from over 500 law schools in more than 80 countries. There are national and regional competitions (much like an NCAA tournament bracket) that are held during January to March that lead up to the final international rounds in Washington.

The competition is based upon a fictional dispute between countries before the International Court of Justice. One team is allowed to participate from each eligible law school and the teams prepare written pleadings and oral argument for both the applicant and respondent positions of the case.

In relating his experience, John said "the most amazing aspect of the competition is that there are students from all over the world who are required to argue their case before the Court in English, which for most is not a primary or secondary language. In addition, the U.S. judicial system has a firm foundation in oral advocacy and the judicial traditions of many countries lack the lively appellate argument peppered with constant questions from the judicial panel, that is so common in the United States." In addition, John served as Chief Justice for some of the cases he heard, and he was the only judge from the United States sitting on the cases that he judged. "Although each judicial panel is different," John related that "I served with judges from Russia, Portugal, Mexico, the Netherlands, and several other nations." In addition, the judges are not supposed to know which countries are represented by the oral teams, nor may the judges have any contact outside of the formal proceedings with the students until the conclusion of the event.

John related that "One aspect of the fictional case that the students had to argue dealt with potential human rights violations. While I did not know the country of origin of the panel of oralists, I surmised that they were from a country that in reality has a very poor human rights record. In the course of the oral argument, I asked the oralist if he believed that the right to free expression constituted a fundamental human right under customary international law. As he responded in the affirmative, I could not help but think that in his country of origin, such rights, in reality, do not exist. It was quite an irony."

John has also served as a judge in Brazil at the Latin American rounds of the International Environmental Law Moot Court Competition which is sponsored by the Stetson University College of Law. "The other observation that I would make is that for the students and judges that I have worked with in the Jessup and Stetson competitions, international law is a very lively and real part of their professional lives and it reminds me of how isolated we can become in the United States regarding international legal issues." John also commented on the high quality of the students that he had the opportunity to meet and work with in both competitions.

JOHN ADAMS HODGE

SCAARLA Board Member John Adams Hodge practices environmental and aviation law with Haynsworth Sinkler Boyd, P.A. in Columbia.

He graduated from Duke with a B.S. Degree in Geology, from USC with an M.S. Degree in Marine Science/Geology, and a J.D. Degree from USC School of Law. He has a Certificate in Planetary Geology from the University of London and is a Registered Professional Geologist (P.G.).



Special points of interest:

- John Hodges Serves as International Moot Court Law Judge
- DHEC's Appeals Process Current Law and Proposed Changes
- FREE—CLE The Nuts and Bolts of a Complaint Before the Office of Disciplinary Counsel or the Ethics Commission

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DHEC's Appeals Process—Current Law and Proposed Changes

By: Carlisle Roberts, Jr., Esquire

The General Assembly created a new process for the review of decisions made by the South Carolina Department of Health and Environmental Control (DHEC or Department), effective July 1, 2006. Act 387 of 2006 contained a number of changes in the administrative appeals process, including a new Code section—S.C. Code Ann. Section 44-1-60, which rewrote the procedure regarding DHEC decisions. After several years' experience with the new process, DHEC proposes some amendments.

Background

Before Act 387 of 2006 became effective, the first step of review for decisions of the DHEC staff was a contested case hearing before the Administrative Law Court (ALC). The ALC's decisions were then reviewed by the Board of Health and Environmental Control (DHEC Board). The Board conducted an appellate-type review and could reverse only upon an error of law or a lack of substantial evidence. *Brown v. DHEC*, 348 S.C. 507, 560 S.E.2d 410 (2002); *Dorman v. DHEC*, 350 S.C. 159, 565 S.E.2d 119 (Ct. App. 2002); former Section 1-23-610(D). The DHEC Board's decision could then be appealed to the Circuit Court, and the Circuit Court's decision could be appealed to the state Court of Appeals and Supreme Court.

Current Law

Section 44-1-60, which was created in Act 387 of 2006, Section 48, established a new review process for DHEC decisions. The first step of review of a DHEC staff decision is now conducted by the DHEC Board. The Board's decision can be reviewed as a contested case by the ALC. The Circuit Court has been removed from the process, and the ALC's decision is appealed directly to the Court of Appeals and Supreme Court.

A person desiring to contest an appealable DHEC staff decision must file a request for final review with the DHEC Board. A request for final review can be filed by "the applicant, permittee, licensee, or affected person." Section 44-1-60(E). DHEC's Notice of Appeal Procedure, which accompanies notice of Department decisions, asks those who file a request for review to include the following information: the grounds on which

the Department's decision is challenged and the specific changes sought in the decision, a statement of any significant issues or factors the Board should consider in deciding how to handle the matter and a copy of the Department's decision or action under review. This information is requested, but is not required.

The DHEC Board has 60 days from the date of receipt of a request for final review to conduct a final review conference. Each month the DHEC Board reviews the pending requests for final review and decides by vote in an open meeting which cases it will hear at the next Board meeting. The Board then notifies all requestors as to whether a review conference will be conducted in their case. The Board must give the parties at least ten days' written notice of the conferences that are conducted. Section 44-1-60(F). The Board can conduct a conference as a full Board or can appoint a committee of three members of the Board or a single designee to hear a case. Section 44-1-60(F)(2). The vast majority of the conferences are conducted by the full Board.

A final review conference is not a trial or an appellate procedure, but is a conference. Although the statute does not provide sufficient time for a formal briefing schedule, any supporting documents that the parties choose to provide are given to the Board in advance of the meeting, along with the administrative record in the case. Parties often elect to submit a summary of their position. At the conference, the DHEC staff makes the first presentation, explaining the decision being contested. The party requesting the conference states the reasons for protesting the staff decision. Any additional parties supporting either the staff decision or the requestor can make a presentation immediately after the party they are supporting. After the initial presentations, each party is given an opportunity for rebuttal, in the same order as the original presentations.



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Parties may present evidence, but the formal rules of admissibility do not apply. Board members can ask questions of anyone providing information at the conference. The burden of proof is on the moving party, i.e., the requestor. Section 44-1-60(F)(1). The Board generally renders a decision at the conclusion of the review conference and has 30 days from the date of the conference to mail a written decision to the parties. Section 44-1-60(F)(2).

The Board's decision is the final agency decision. Section 44-1-60(F)(2). If the Board decides not to conduct a review conference in a case, the staff's decision becomes the final agency decision. Section 44-1-60(F). In either event, an applicant, permittee, licensee, or affected person may request a contested case hearing before the ALC. A party that files a request for a hearing with the ALC must simultaneously serve a copy of the request on DHEC. Section 1-23-600(B).

Between July 1, 2006, and September 30, 2009, requests for final review (RFRs) were filed in connection with 490 staff decisions. On average, about 13 RFRs are filed each month, and 150 per year. The number of RFRs filed in 2009 was somewhat lower than average, reflecting a current decline in the number of permit applications received. As of December 10, 2009, the DHEC Board had scheduled a final review conference in 46 cases, including two conferences scheduled for January. Of the 44 cases which have been disposed of, the staff decision was affirmed in 18 cases (41%); the staff decision was reversed, modified or remanded in 11 cases (25%) (remanded in 4 cases); and 15 cases (34%) were either settled or withdrawn prior to the conference.

Proposed Changes

DHEC has proposed several changes in the process provided in Section 44-1-60. The proposed changes are intended to be minor improvements in the process, rather than major revisions. The proposed changes are as follows:

Filing Fee. We propose a filing fee of \$100 be required

when a request for final review is filed with the DHEC Board. Filing fees are required in other arenas, and a fee may help reduce appeals intended solely for delay. The fee would be retained by the Department to defray costs of the proceedings and legal expenses.

Increase the time to conduct a final review conference from 60 days to 90 days. A short period of additional time will allow the DHEC Board to decide which cases to hear at regular meetings without having to hold additional called meetings.

The legislature desired to shorten the review process for DHEC cases, as well as appeals from other agencies. As a result, the Circuit Court, which tended to be the most time-consuming step due to overcrowded dockets, was removed from the administrative appeals process, and Section 44-1-60 provides short deadlines for each step of the DHEC Board's review: 15 days to request review, 60 days to conduct the review and 30 days to issue a written order.

The DHEC Board generally meets once a month, on the second Thursday. The Board decides at a Board meeting which decisions it will review at the next Board meeting. The calendar works out such that the Board often cannot decide at a regular board meeting which cases it will review. As a result, special conference-call meetings must be scheduled from time to time, which wastes time and money for interested parties, the Board and Department staff. DHEC proposes to increase the 60-day time limit to 90 days to allow the Board to decide at its regular meetings which decision's to review.

The time period for conducting a final review conference may be extended upon written agreement of all parties or by reasonable continuance for good cause shown. While it is important to proceed expeditiously through the



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review process, there are times when a continuance is necessary. A lawyer or necessary party may become ill, have a conflict with a court appearance or, as occurred recently, have a death in the family at the last minute. In addition, the parties to a case occasionally desire additional time in order to work out a settlement. Because of the short review period for the DHEC Board, a review conference scheduled for a particular meeting cannot usually be continued to the next meeting. Other forums can grant a reasonable continuance in such circumstances, but there is currently no provision in the law for continuance of a DHEC Board Review conference.

Notice of a decision can be sent by means other than certified mail in certain circumstances. Current law requires that notice of DHEC decisions must be sent to the applicant, permittee, licensee, and affected persons who have asked to be notified by certified mail, return receipt requested. If several hundred people sign up at a public hearing to receive notice of a Decision, for DHEC to send notice by certified mail is expensive for the Department and may be inconvenient for the recipients, who may prefer to receive notice by regular mail or e-mail, rather than having to go to the Post Office to pick up certified mail. In addition, certified mail takes too long for some types of permits that are routinely delivered or picked up promptly, such as restaurant licenses and septic tank permits.

Affected persons should have the option of requesting notice by regular mail or e-mail and the Department should be able to transmit routine, non-controversial decisions by regular mail, delivery or other appropriate means.

A request to be notified of a staff decision must be in writing. The statute should specify that person who request to be notified of a staff decision must do so in writing, in order to eliminate any uncertainty as to who has requested notification.

If the Board declines to conduct a final review conference, the requestor's time to file for review at the Administrative Law Court starts upon receipt of notice of the Board's decision to decline. The statute provides

that if the Board does not conduct a final review conference, the requestor has 60 days from the date the request for review was filed to file for review with the ALC. However, the DHEC Board generally decides which staff decisions it will review and notifies the requestors of its decision early in the 60-day review period. Starting the requestor's time for filing with the ALC 30 days after receipt of notice that a Board conference will not be conducted will expedite the process and will give requestors the customary 30 days to file with the ALC.

Clarify "staff decision"/"department decision" language. The statute uses the term "staff decision" for any appealable decision made by DHEC. Section 44-1-60(D). The statute appears to use "department decision" as a subset of staff decisions in which a more detailed explanation is issued in non-routine, more controversial decisions.

Section 44-1-60(D). The usage of the two terms is not always consistent and should be clarified.

Board can remand if further action by staff is necessary; the decision after remand can be appealed to the Board or becomes final if uncontested. In some cases the only appropriate remedy for the Board is to remand a decision to the staff for further action. If the Board concludes that staff failed to consider a certain factor required by statute or regulation, the Board's only option is to remand it to staff for such consideration; the Board's role is to review decisions made by staff, not to make decisions or analyses in the first instance. If a matter is remanded to staff for further action as required by the Board, the staff's decision on remand should be appealable to the Board by an affected party or should become final if it is not contested.

The Board believes it has inherent authority to remand to staff when necessary but the issue should be clarified in the statute. Through December 2009, the Board had only remanded in four cases, but remand is a necessary option in certain cases.



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Carlisle Roberts, Jr.

Board can admit additional affected persons as intervenors if it won't delay or unduly prolong the proceedings. An affected person may be content with a staff decision and therefore not file a request for review. When another party files a request for review, an affected person who did not file a request may have legitimate interests to protect and may therefore desire to be a party. The Board believes it has inherent authority to admit proper intervenors if the proceedings won't be delayed or unduly prolonged, but the issue should be clarified in the statute. Extend deadlines which fall on a weekend or holiday to the next working day. This is the rule under which the legal community generally operates, but it is expressly stated in various court rules, including the rules of the appellate courts, circuit court and ALC. This provision should be included in the statute to provide certainty to parties and eliminate confusion.

The DHEC staff makes tens of thousands of decisions which could be appealed each year, including a variety of permits, licenses, certifications and enforcement orders. The vast majority of these decisions are not controversial and are not contested. The Board's ability to review the relatively small number of staff decisions that are contested is an important part of the Board's oversight of the agency. DHEC does not believe major changes in the current process are needed, but believes the changes described above will improve the system.

Carl Roberts has practiced law for 27 years and has served as General Counsel and a member of the executive management team for the S.C. Department of Health and Environmental Control since 1994. He previously served as Director of Natural Resources and Environmental Counsel to the Governor, DHEC Staff Attorney and Assistant Attorney General. He has argued more than 50 cases before the South Carolina Supreme Court and has taught a number of continuing legal education seminars for attorneys. Carl received his B.S. from the University of South Carolina in 1977 and his J.D. from the USC School of Law in 1982. He is a Commissioner of the South Carolina State Housing Finance and Development Authority and Chairman of the Environmental Subcommittee of the U.S. Attorney's Law Enforcement Coordinating Committee. Carl received the Order of the Palmetto in 1995 and is a member of the Rotary Club of Columbia.

Carl has previously served as the Governor's Designee for the Natural Resource Trustees for the State of South Carolina and has been a member of the S.C. General Assembly's Hazardous Waste Management Select Oversight Committee, the U.S. Department of the Interior's Outer Continental Shelf Policy Committee, the S.C. Solid Waste Advisory Council, the S.C. Wetlands Steering Committee, the S.C. Energy Policy Panel, the S.C. Water Resource Commission's Natural Resource Decision Support System Advisory Committee, the Central Midlands Regional Planning Council's Environmental Planning Advisory Committee, and the Palmetto Trust for Historic Preservation Board.

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REGISTRATION FORM

SCAARLA will be offering a free ethics CLE for its members. The CLE is entitled *The Nuts and Bolts of a Complaint Before the Office of Disciplinary Counsel or the Ethics Commission* and is being held on January 29, 2010 from 9:30—1:30 at the Richland County Public Library. This free CLE is for SCAARLA MEMBERS ONLY. **Seating is limited. You must register by Monday, January 25, 2010 if you wish to attend.** A registration form is attached to this email. Registrations forms may be emailed to scaarla@gmail.com or may be mailed to SCAARLA, P.O. Box 7601, Columbia, SC 29202.

REGISTRATION FORM

The Nuts and Bolts of a Complaint Before the Office of Disciplinary Counsel or the Ethics Commission

Name: _____

Address: _____

City/State/Zip: _____

Bar#: _____

Email: _____

Telephone#: _____

All correspondence about this seminar will be conducted via email, therefore, you must provide an email address. Materials for the seminar will be emailed to you prior to the seminar. Materials will NOT be distributed at the seminar. Please note that no food or drinks are allowed in the seminar.

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**FOSTERING DEVELOPMENT
OF ADMINISTRATIVE LAW**



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